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FEBRUARY 28, 2019

Submission to the Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises Regarding the Zero Draft of the of the proposed legally binding instrument on business activities and human rights

The Indian Law Resource Center (Center) welcomes the opportunity to provide input on the "Zero Draft"—the first draft of the legally binding instrument on business activities and human rights. On July 19, 2018, the Chair of the Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises (Working Group) submitted the Zero Draft to the U.N. High Commissioner for Human Rights.[1] In mid-October 2018, the Working Group discussed the Zero Draft during its fourth session and called all stakeholders to submit relevant comments and proposals.[2]

The development of the draft instrument is a singularly important opportunity to shape the development of international human rights law. This instrument can create a legal framework that will fill gaps in the current system and provide access to justice for individuals, communities, and peoples, including indigenous peoples—when their human rights are violated by business enterprises. The Zero Draft is a significant step forward that allows for a much-needed focused discussion on key legal matters.

The legal framework developed by this instrument must be broad enough in scope to reach the full range of rights violations by all sorts of transnational corporations and other business enterprises. It must recognize and uphold the full body of human rights laws, including indigenous peoples' rights. And the system must also be practical and provide an effective remedy for victims of human rights abuses. A system that is too complex or burdensome will not work.

Our comments and proposed language on key provisions of the Zero Draft are below. We

[1] Letter from the Permanent Mission of Ecuador to H.E. Zeid Ra'ad Al Hussein, U.N. High Commissioner for Human Rights, July 19, 2018.

[2] Draft Report on the Fourth Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Chair-Rapporteur Luis Gallegos, 2018, ¶ 22 (calling member states and other stakeholders to submit comments and proposals no later than the end of February 2019).

focus on two themes—how to make this instrument effective for Indigenous Peoples and how to make sure that business interests are not able to unfairly use legal technicalities to avoid responsibility.

Article 3: Scope and Article 4: Definitions

The Zero Draft's scope-related provisions are not clear. Article 3(1) requires substantive clarification. As drafted, it states "This Convention shall apply to human rights violations in the context of any business activities of a transnational character." Article 4(2) then defines "business activities of a transnational character" as

> Any for-profit economic activity, including, but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means, that take place or involve actions, persons or impact in two or more national jurisdiction.

As we have stated in previous submissions, clarifying the standards that apply to all business entities will improve the coherence of human rights law and ensure that private business actors, state sponsored entities, and public sector financial institutions all compete on the same level ground, adhere to the same legal standards, and are responsible for upholding the same set of human rights obligations.[3]

Limiting the Convention's application to "any for-profit economic activity" may lead to the under application of the instrument's many important protections. The addition of the "for-profit" element would risk the addition of an unnecessary inquiry into the mental intention of business entities. It might require litigation about whether, for instance, all subsidiaries or actors in supply chain transactions are acting "for-profit" in specific deals or when the purely business activities of state-owned enterprises are "for profit." This is an unnecessary inquiry.

It is also an unnecessary limitation on the terms of the Human Rights Council resolution establishing the Working Group, which requires the Working Group to regulate the "activities" of transnational corporations and of business enterprises that have a transnational character in their operational activities. The mandate calls for an instrument that will address the activities or "operational activities" of relevant enterprises.

We believe that it is very important that the language in Human Rights Council Resolution 26/9 which establishes the Working Group be retained in Article 3(1). Article 3(1) should be revised to read: "This Convention shall apply to human rights violations in the context of activities of transnational corporations and other business enterprises."

In Article 4(2), following the recommendation of the FIDH,[4] we suggest use of a broader term than "natural or legal person" to ensure that partnerships or joint ventures, or wholly or partially state-owned enterprises that may exist under legally defined terms but without separate legal personality would still be covered by this instrument. As FIDH observes, the definition of enterprise

[3] It is worth noting that a recent decision by the United States Supreme Court found that international organizations are not absolutely immune from suit. This ruling recognizes that foreign governments, international organizations and business entities may each be subject to legal liability in certain situations. Jam v. Int'l Fin. Corp., No. 17-1011, 2019 WL 938524, (U.S. Feb. 27, 2019). We believe this is an important legal principle that this instrument should seek to reinforce.

[4] *Preliminary Comment on the "Zero Draft" Convention*, FIDH, October 2018 (No 725a), at page 6.

found in the North American Free Trade Agreement would appear to be a more useful definition: "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association." Adopting this or similar language would better ensure that the instrument does not simply create new loopholes in the law for business entities to exploit.

We recommend that 4(2) be revised to read:

> human rights violations in the context of activities of transnational corporations and other business activities" shall mean operational activity including but not limited to productive or commercial activity, undertaken by natural or legal persons, or by any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including activities undertaken by electronic means, that take place or involve actions, persons or impact in two or more national jurisdictions.

The text of Article 3(2) should also be clarified. It should more clearly specify the sources of international human rights obligations. Although this will be helpful for all those seeking to use this instrument, it is essential for indigenous peoples that the instrument address indigenous rights directly. While many human rights are individual rights, many of the human rights of indigenous peoples are held collectively by communities, tribes, nations, or peoples. These include extensive rights relating to self-governance and indigenous ownership and control over lands and resources.

Too often businesses fail to appreciate the extent of indigenous land rights or fail to acknowledge or recognize indigenous governments and decision-making institutions. Indigenous peoples' collective human rights are sufficiently distinct from other human rights that specific language in the instrument is needed to ensure that they are recognized, properly analyzed, and fully protected by the new instrument.

The text in Article 3(2) should be revised to read "This Convention shall cover all international human rights, including indigenous rights…".

The text should also provide more details to clarify what is meant by the statement that "this Convention shall cover…those rights recognized under domestic law." It is not clear what domestic law rights are referred to nor what it might mean for the Convention to "cover" those rights.

Article 9: Prevention

Article 9(2) describes the content of business' due diligence obligations. In 9(2)(g) the Zero Draft states that performance of due diligence will include

> Carrying out meaningful consultations with groups whose human rights are potentially affected by the business activities and other relevant stakeholders, through appropriate procedures including through their representative institutions, while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees and internal displaced persons.

It is important to emphasize that indigenous peoples are not simply one of many vulnerable groups. Indigenous peoples have specific human rights that are recognized and protected by the UN Declaration on the Rights of Indigenous Peoples (UN Declaration). Among these are rights to their

lands, territories and natural resources, and the right of self-determination, including self-government. The important legal principle of free, prior and informed consent arises out of and exists to safeguard indigenous peoples substantive rights. For example, in Article 32(2), the UN Declaration upholds the legal principle of consent in relation to indigenous peoples' land rights.

Carrying out only "meaningful consultation" with indigenous peoples will often fail to meet the minimum standards of the UN Declaration, in particular Articles 19, 29, and 32. No new instrument, such as the legally binding instrument on business activities and human rights, can set lower standards than those already set by this organization and its member states.

To remedy this, we recommend that Article 9(2) adds a paragraph to ensure that the Zero Draft is consistent with the UN Declaration and mirrors Article 32(2) of the UN Declaration. This new paragraph should read:

> Consulting and cooperating in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

CONCLUSION

The Indian Law Resource Center is committed to upholding and advancing indigenous peoples' rights throughout the human rights system. This new instrument presents a vital opportunity to create powerful new tools to implement existing human rights commitments, hold all transnational business entities accountable for their activities, and provide meaningful justice to victims. We strongly support the efforts of the Working Group and look forward to continuing to contribute to this work however we are able.